

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Staff White Paper on)	
Commission's Role Regarding)	Docket No. AD12-1-000
Environmental Protection Agency's)	
Mercury and Air Toxics Standards)	

**COMMENTS OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES,
THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,
AND THE MASSACHUSETTS DEPARTMENT OF ENERGY RESOURCES**

Pursuant to the Federal Energy Regulatory Commission ("FERC" or "Commission") Staff's request for comments on in its January 30, 2012 White Paper on the Commission's Role Regarding Environmental Protection Agency's ("EPA") Mercury and Air Toxics Standards (the "White Paper"),¹ the Massachusetts Department of Public Utilities ("Mass DPU"), the Massachusetts Department of Environmental Protection ("MassDEP"), and the Massachusetts Department of Energy Resources ("Mass DOER") (collectively, "Massachusetts") hereby submit the comments contained herein.

I. DESCRIPTION OF COMMENTERS

The Commonwealth of Massachusetts is the largest state by population and load in New England.² It comprises 46% of both the region's population and electricity consumption.³

¹ Staff White Paper on the Commission's Role Regarding Environmental Protection Agency's Mercury and Air Toxics Standards, Jan. 30, 2012 ("White Paper"), *available at* www.ferc.gov/media/news-releases/2012/2012-1/01-30-12-white-paper.pdf.

² See U.S. Census Bureau, *2010 Census Results*, *available at* <http://2010.census.gov/2010census/data/>; ISO New England Inc., 2011 Regional System Plan at 28 (Table 3-1) ("2011 Regional System Plan").

³ ISO New England Inc., Massachusetts 2011-12 State Profile ("ISO-NE Massachusetts 2011-12 State Profile"), *available at* www.iso-ne.com/nwsiss/grid_mkts/key_facts/ma_12-2011_profile.pdf.

Generating plants located in Massachusetts represent 41 % of New England’s capacity and our capital city, Boston, is the largest load center in the region.⁴

The Mass DPU is the agency of the Commonwealth of Massachusetts charged with general regulatory supervision over gas and electric companies in Massachusetts and has jurisdiction to regulate rates and charges for the sale of electric energy and natural gas to consumers. Mass. Gen. Laws c. 164, § 76, et seq. Therefore, the Mass DPU is a “state commission” as defined by 16 U.S.C. § 796(15) and 18 C.F.R. § 1.101(k).

The MassDEP is the state agency responsible for ensuring clean air and water, including the regulation and safe management of hazardous air pollutants. Mass. Gen. Laws c. 111, §§ 142A-O. The MassDEP is also specifically responsible for the administration and enforcement of those sections of the federal Clean Air Act which regulate hazardous air pollutants, including mercury. *See* 42 U.S.C. § 7412.

The Mass DOER is the Massachusetts executive agency responsible for establishing and implementing the Commonwealth’s energy policies and programs, generally. Pursuant to Mass. Gen. Laws c. 25A, § 6, Mass DOER is authorized and directed to: (1) plan, develop, oversee, and operate programs to help consumers understand, evaluate, and select retail energy supplies and related services offered as a consequence of electricity and gas utility restructuring; (2) develop and administer programs relating to energy conservation, demand-side management, alternative energy development, non-renewable energy supply and resources development, energy bond authority, energy information and energy emergencies; (3) advise, assist, and cooperate with other state, local, regional, and federal agencies in developing appropriate programs and policies relating to energy planning and regulation in the

⁴ ISO-NE Massachusetts 2011-12 State Profile; 2011 Regional System Plan at 32 (Table 3-3).

Commonwealth; (4) develop energy data and information management capabilities to aid energy planning and decision-making; and (5) promote the development of sound energy education programs.

II. COMMUNICATIONS

Massachusetts requests that the individuals identified below be placed on the Commission's official service list in this proceeding and that all communications related to this filing and future filings in this proceeding should be directed to:

Jason R. Marshall*
Counsel
MA Department of Public Utilities
Division of Regional and Federal Affairs
One South Station, Fourth Floor
Boston, Massachusetts 02110
Tel: (617) 305-3640
Fax: (617) 345-9103
E-mail: Jason.Marshall@state.ma.us

Douglas B. Shallcross
Deputy General Counsel
MA Department of Environment Protection
Office of General Counsel
One Winter Street
Boston, Massachusetts 02108
Tel: (617) 292-5877
Fax: (617) 338-5511
E-mail: Douglas.Shallcross@state.ma.us

Courtney Feeley Karp
Legal Counsel
MA Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114
Tel: (617) 626-7382
Fax: (617) 727-0030
E-mail: Courtney.Karp@state.ma.us

* Person designated for service.

III. INTRODUCTION

The EPA issued the Mercury and Air Toxics Standards ("MATS") final rule on December 21, 2011 pursuant to its authority under the Clean Air Act.⁵ The MATS rule

⁵ White Paper at 1 (citing 42 U.S.C. § 7412(i)(3)(A) (2006)).

adopted emissions limits on mercury, acid gases, and other toxic air pollutants from coal and oil-fired electric generating plants.⁶

MassDEP commented on EPA's proposed MATS rule, supporting those regulations for many reasons, most notably that strong federal requirements for air toxics would lead to improved air quality in Massachusetts.⁷ Massachusetts has dramatically reduced mercury and other harmful emissions from our power plants in the absence of federal regulation; however, our residents are not enjoying the full benefit of these reductions because we are downwind of states that have not imposed similar controls. MassDEP supported the MATS rule, in large part, to ensure that EPA takes action in other areas to reduce emissions of toxic air pollutants that continue to affect our region. MassDEP urged EPA to move expeditiously to finalize the regulations and fulfill the promise embedded in the final rule. Massachusetts has a strong interest in ensuring that emission controls in other areas are installed within the timeframes required under the Clean Air Act and that any extensions are granted only after careful review and consideration.

Entities required to comply with the MATS emissions limits must do so within three years of the final rule's effective date.⁸ However, Section 112(i)(3)(B) of the Clean Air Act

⁶ *Id.* See The Environmental Protection Agency's Enforcement Response Policy For Use Of Clean Air Act Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury and Air Toxics Standard (Dec. 16, 2011) ("EPA Policy Memorandum") at 1, *available at* www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf.

⁷ MassDEP, *Comments on Proposed Utility MACT and NSPS Rules*, July 29, 2011, Docket ID No. EPA-HQ-OAR-2009-0234, *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0234-18039>.

⁸ White Paper at 1. See also EPA Policy Memorandum at 3 (citing Section 112(i)(3)(A) of the Clean Air Act and 40 CFR § 63.9984).

allows for a one year extension (i.e., a fourth year) of the compliance date if necessary for technology installation or to address other issues that arise.⁹

The EPA stated in a December 16, 2011 policy memorandum (“EPA Policy Memorandum”) that Section 113(a) of the Clean Air Act also permits it to grant an additional one year extension (i.e., a fifth year) “to address a specific and documented reliability concern.”¹⁰ The EPA would grant such extension through a Section 113(a) administrative order (“AO”) mechanism, but it would limit its discretion in issuing AOs to “units that are critical for reliability.”¹¹ While the EPA will make the sole determination of whether to issue an AO, the EPA Policy Memorandum states that it “intends to consult, as necessary or appropriate on a case-by-case basis, with FERC and/or other entities with relevant reliability expertise.”¹²

The White Paper outlines FERC staff’s proposed approach for how the Commission would advise the EPA on reliability issues related to an entity’s request for a time extension to comply with the recently finalized MATS rule and seeks comments on this proposed approach. Massachusetts largely agrees with the approach FERC staff sets forth in its White Paper. However, in response to FERC staff’s request for comments, we detail below our support for the Commission’s *de novo* review of filings made with the Commission pursuant to an entity’s request for an extension under an AO. We additionally ask that states and other interested

⁹ EPA Policy Memorandum at 3. *See* The Environmental Protection Agency, Reducing Toxic Pollution from Power Plants: Presentation to Regional Transmission Organizations (Feb. 2, 2012) at 15 (noting that the “EPA has provided guidance indicating that this 4th year should be broadly available” and listing on-site power replacement and reliability impacts, in addition to installation of controls, as illustrative scenarios for when the compliance date may be extended for an additional year).

¹⁰ EPA Policy Memorandum at 2. *See* 42 USC § 7413.

¹¹ EPA Policy Memorandum at 2. The EPA Policy Memorandum notes that the EPA intends to handle on a case-by-case basis units needed for reliability that require more than an additional year to achieve compliance. *Id.*

¹² *Id.* at 7.

parties have a meaningful opportunity for their comments to be considered by the Commission concurrent with its review of AO requests.

IV. COMMENTS

A. The Commission Should Undertake a *De Novo* Review of Informational Filings

The EPA Policy Memorandum proposes that the Commission would receive a copy of the AO request submitted by a unit that may affect reliability.¹³ This submission, and the copy received by the Commission, would include the relevant planning authority's "written concurrence with the owner/operator's analysis, or a written explanation of why the planning authority's concurrence cannot be provided."¹⁴

The White Paper proposes that an AO request filed with the Commission would be treated as an informational filing. FERC staff seeks comments on whether the Commission's review of such informational filings "should be conducted de novo (a new analysis, conducted as if the planning authority's original analysis had not taken place) or should accord some level of deference (possibly similar to appellate review) to the planning authority's analysis."¹⁵

Massachusetts believes that the Commission should conduct a *de novo* review of all informational filings received. Planning authorities may use varying criteria to determine the reliability risk of a unit that is taken out of operation. The Commission can and should recognize regional differences as part of its evaluation of reliability impacts. However, fairness and transparency in the review process is best promoted by the Commission's establishment of a uniform standard to conduct reliability analyses. Such a uniform standard would provide a consistent set of rules applicable to all entities seeking an extension.

¹³ *Id.* at 5-7; White Paper at 6.

¹⁴ White Paper at 6.

¹⁵ *Id.* at 7 (emphasis in original).

Additionally, each planning authority has its own practices and rules, which will likely be unfamiliar to many located outside the planning authority's footprint (and perhaps even to those within the planning area). A *de novo* review, where a uniform and consistent standard is applied, would place less emphasis on these esoteric practices and rules and facilitate both participation in the process and an understanding of the reliability analysis that the Commission relies on to provide guidance to the EPA.

B. The Commission Should Provide States and Other Interested Parties a Meaningful Opportunity to Comment During the AO Review Process

FERC staff states in the White Paper that it believes entities should not be permitted to intervene in the preparation of the Commission's comments to the EPA.¹⁶ Rather, FERC staff notes that "the EPA Policy Memorandum requires an owner/operator requesting an AO to submit '[c]opies of any written comments from third parties directed to, and received by, the owner/operator in favor of, or opposed to, operation of the unit after the MATS compliance date'" and that these comments would be included in the informational filing made with the Commission.¹⁷ FERC staff further states: "When appropriate, the Commission *may* consider the comments submitted *as part of the informational filing* in developing its written comments to the EPA, but in doing so those commenters will not be treated as interveners."¹⁸ Other comments received by the Commission would be placed in the appropriate docket, but "staff does not anticipate that the Commission would be required to address comments received."¹⁹

Massachusetts believes that the Commission should provide states and other interested parties a meaningful opportunity for their comments to be considered before the Commission

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 7-8 (quoting EPA Policy Memorandum at 7).

¹⁸ *Id.* at 8 (emphasis added).

¹⁹ *Id.* at n. 21.

provides guidance to the EPA on AO requests. Prior to the submission of an AO request to the Commission, there does not appear to be an opportunity for states and others to review two critical elements of an AO request: (1) the owner/operator's reliability risk analysis and (2) the relevant planning authority's concurrence or separate analysis of the reliability risk.²⁰

Accordingly, this information gap could significantly limit the ability of states and other parties to inform the Commission during the AO request process. The Commission should seek to correct this deficiency by allowing states and others to comment and by considering these comments in its review of informational filings.

V. CONCLUSION

WHEREFORE, for the forgoing reasons, Massachusetts hereby files these comments on FERC staff's White Paper.

Respectfully submitted,

/s/ Jason R. Marshall

Jason R. Marshall

Counsel

MA Department of Public Utilities

Division of Regional and Federal Affairs

One South Station, Fourth Floor

Boston, Massachusetts 02110

Tel: (617) 305-3640

Fax: (617) 345-9103

E-mail: Jason.Marshall@state.ma.us

/s/ Douglas B. Shallcross

Douglas B. Shallcross

Deputy General Counsel

MA Department of Environmental Protection

Office of General Counsel

One Winter Street, Third Floor

Boston, Massachusetts 02108

Tel: (617) 292-5877

Fax: (617) 338-5511

E-mail: Douglas.Shallcross@state.ma.us

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See EPA Policy Memorandum at 7. The EPA Policy Memorandum proposes to require entities seeking an AO to provide notice to a limited recipient group, including state agencies with permitting authority under Titles I and V of the Clean Air Act. *Id.* at 5-6. However, there is no requirement contemplated to ensure that these parties have an opportunity to review reliability risk analyses prior to submission of the AO.

/s/ Courtney Feeley Karp
Courtney Feeley Karp
Legal Counsel
MA Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, Massachusetts 02114
Tel: (617) 626-7382
Fax: (617) 727-0030
E-mail: Courtney.Karp@state.ma.us

Date: February 29, 2012

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010 (2008), I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Boston, Massachusetts on this 29th day of February, 2012.

/s/ Jason R. Marshall
Jason R. Marshall